

# The Supreme Court and the Advisory Opinion

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The task of courts applying law in the "great society" is never an easy one. At all times they must harmonize the claims of stability with those of progress; the claims of liberty with those of equality, and both of them with order. Compelled to preserve to justice its universal quality, they must nevertheless leave to it the capacity to be individual and particular. Attempting to reconcile the irreconcilable they encounter difficulty in periods when social patterns are relatively fixed in character.<sup>1</sup> Increasingly difficult is their problem in times of marked social change,<sup>2</sup> and in a political environment in which confidence is placed in written constitutions;<sup>3</sup> "parchment barriers";<sup>4</sup> checks and balances;<sup>5</sup> separation of powers;<sup>6</sup> the idea of a government

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<sup>1</sup> Benjamin Cardozo, *Paradoxes of Legal Sciences*, pp. 4-5.

"The reconciliation of the irreconcilable, the merger of the antithesis, the synthesis of the opposites, these are the great problems of the law. 'Nomos,' one might fairly say, is the child of the antinomies, and is born of them in travail. We fancy ourselves to be dealing with some ultra-modern controversy, the product of the clash of interest in an industrial society. The problem is laid bare, and at its core are the ancient mysteries crying out for understanding—rest and motion, the one and the many, the self and the not self, freedom and necessity, reality and appearance, the absolute and the relative." Cardozo, *Paradoxes of Legal Science*, (1928), pp. 4-5.

<sup>2</sup> Sir Frederick Pollock, *The Expansion of the Common Law* (1904), pp. 107-138.

<sup>3</sup> Forrest R. Black, "Constitution and Democracy," *Annals of the American Academy of Political and Social Sciences*, Vol. 169, Sept., 1933, pp. 1-11.

<sup>4</sup> Forrest R. Black, *The American Constitutional System—An Experiment in Limited Government*, 24 *Ken. L. J.* 24 (1935).

<sup>5</sup> John Adams discovered no less than eight different kinds of balances in our system. *Ibid.*, p. 17.

<sup>6</sup> Roscoe Pound, *Justice According to Law*, 13-14 *Col. L. Rev.* 696-713; see also R. H. Jackson, *An Organized American Bar*, *American Bar Association Journal*, June, 1932, Vol. 18, p. 384.

of law as opposed to a government of men;<sup>7</sup> and the idea of a mechanical application of a law as opposed to free legal decision.<sup>8</sup>

Today we are experiencing a period of rapid social change. New conditions of life brought about by the technological advance compel social adjustments along a broad front.<sup>9</sup> As the courts essay the difficult task of infusing new social ideas into the body of existing legal material, they inevitably encounter a degree of discontent with their efforts.<sup>10</sup> In some instances dissatisfaction takes the form of mild derision; in other cases it verges on open hostility. It may come from the left or the right. It may emanate from the socially-minded individual who is disappointed with the law's lag and holds the court's responsible or from a bitterly critical interest group whose vested interests have been interfered with. In all events the results are the same. The courts become the storm-center of demands for a change.<sup>11</sup> The revisions suggested take various forms. Some would modify this practice; others would alter that procedure; while still others would eliminate altogether the existing powers of the court.

<sup>7</sup> Justice H. H. Lurton, *Government of Law or a Government of Men*, *North American Review*, Jan., 1911; Louis Boudin, *Government by Judiciary*, Vol. 2, pp. 531-551, (1932); Howard L. McBain, *The Living Constitution*, pp. 1-3; Edward S. Corwin, *The Twilight of the Supreme Court* (1934), pp. 102-148.

<sup>8</sup> See Charles G. Haines, *The American Doctrines of Judicial Supremacy*, (2nd Edition), (1932), pp. 500-510.

<sup>9</sup> Jerome Frank, *Law and the Modern Mind*, pp. 6-7.

<sup>10</sup> F. R. Aumann, *Public Opinion and the Legal Technique*, 49 U. S. Law Review (No. 2) 71-90 (1935).

<sup>11</sup> This may be a very wholesome tendency. "It is a mistake to suppose," said Justice David J. Brewer, in his speech on "Government by Injunction," on Lincoln's birthday in 1898, "that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its judges should be the object of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set up on a pedestal and decorated with a halo. True, many criticisms may be like their authors, devoid of taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the stagnant waters is stagnation and death." Quoted by Silas Bent in *Justice Oliver Wendell Holmes*, pp. 8-10.

A reflection of this tendency can be seen in the national government. In recent months the Supreme Court has become the center of renewed interest. On numerous occasions suggestions have been made that we subject the work and authority of that body to a re-evaluation, particularly with regards to its power to declare acts of Congress unconstitutional.<sup>12</sup> The grievances uttered are not new.<sup>13</sup> They have appeared on frequent occasions in the past, and usually include a proposal to require a vote of seven of the nine judges to hold an act of Congress invalid;<sup>14</sup> a proposal to increase the number of justices; a proposal to curb the power of the court by abolishing its right to receive cases on appeal from the lower courts; a proposal that the court upon request by the legislature or executive be required to give its opinion as to the constitutionality of any proposed measure or actions submitted to them.

<sup>12</sup> "What to do with the Supreme Court?" A discussion by Morris R. Cohen, Louis A. Boudin, and Osmond K. Frankel. *The Nation*, June 10, 1935, pp. 39-43; Paul Blanchard, "Shall We Scrap the Constitution?", *The Forum*, August, 1935, Vol. XCIV, pp. 69-73; Glenn Frank, "Shall We Keep the Constitution?", *The Forum*, Aug., 1935, Vol. XCIV, pp. 69-73; Thomas Reed Powell, "Recovery and the Supreme Court," *Today*, Nov. 18, 1933, pp. 3-4, 34-35; Leo Haberman and M. Wieting, "Supreme Court and Constitution," *Scholastic*, Sept. 28, 1935; C. A. Beard, "Social Changes vs. Constitution," *Current History*, July, 1935; Edward S. Corwin, *The Twilight of the Supreme Court*, Yale University Press (1934); "What is the Constitution?", *World Tomorrow*, Sept. 14, 1933; "The Battle Lines of 1936," *Colliers Weekly*, Feb. 17, 1934, p. 54; Max Lerner, "John Marshall's Long Shadow," *New Republic*, Sept. 8, 1935; Howard L. McBain, "The Constitution and the New Deal," *Yale Review*, Sept., 1935; Thomas R. Powell, "The Constitution and Social Security," *Annals of the American Academy of Political and Social Science*, Sept., 1935; Walter M. Whittlesey, "Back of the Confederation," *Survey Graphic*, July, 1935; Hugh S. Johnson, "Playing with Dynamite," *American Magazine*, Sept., 1935; A. H. Dixon, "Constitution and Congress," *National Republic*, Oct., 1935; D. W. Brogan, "The American Constitutional Crisis," *Fortnightly*, July 1935; Edwin F. Blair, "Has the Supreme Court Doomed the New Deal?", *Fortune*, Sept., 1935.

<sup>13</sup> F. R. Aumann, *The American Doctrines of Judicial Review*, 20 Ken. L. J. 276, 303 (1932).

<sup>14</sup> It is interesting to note that a national poll was conducted by the American Institute of Public Opinion in August, 1935, on the question "Do you favor curbing the powers of the Supreme Court?" Incidentally 59% of those voting opposed curbing the Court's power. A differently worded poll conducted somewhat later by the same body indicated that 53% of those voting opposed curbing the Court's power. *Cleveland Plain Dealer*, Nov. 3, 1935.

The proposal concerning advisory opinions with which we are especially concerned here, has several interesting aspects. In the first place the "advisory opinion," so-called, has been widely used in one form or another both here and in England; and secondly, it has commanded some very respectable support over a long period of time. Among others who have advocated its adoption in recent years are: A. R. Ellingwood,<sup>15</sup> W. F. Willoughby,<sup>16</sup> Manley O. Hudson,<sup>17</sup> Clarence W. Updegraff,<sup>18</sup> James M. Beck,<sup>19</sup> Heywood Broun,<sup>20</sup> and Governor Harold Hoffman of New Jersey.<sup>21</sup> Today it is receiving a widespread public attention as the constitutionality of many New Deal measures becomes a question of serious moment; and criticism has been directed at the soundness of a governmental practice which permits so much time to elapse between the passage of an act of Congress and the date of its final passage.<sup>22</sup>

<sup>15</sup> A. R. Ellingwood, *Departmental Cooperation in State Government*, (1929). This book by a leading authority on the subject is a very thorough study of the law and practice of advisory opinions.

<sup>16</sup> W. F. Willoughby, *Principles of Judicial Administration*, (1929) pp. 85-88.

<sup>17</sup> Manley O. Hudson, *Advisory Opinions of National and International Courts*, 37 Harv. L. R. 971-1001 (1923).

<sup>18</sup> Clarence W. Updegraff and Paul C. Clovis, *Advisory Opinions*, 13 Iowa L. R. 188 (1928).

<sup>19</sup> Mr. Beck in an address delivered at the annual dinner of the Pennsylvania Society of New York on Dec. 20, 1924, recommended that the possibilities of "advisory opinions" by the Supreme Court be given careful consideration. He seemed to think the practice would serve a very useful purpose. See *New York Times*, Dec. 21, 1924.

<sup>20</sup> Heywood Broun, "It Seems to Me," *The Columbus Citizen*, Jan. 23, 1935.

<sup>21</sup> "A Specious Short Cut," *The Saturday Evening Post*, Jan. 11, 1936, p. 26.

<sup>22</sup> "For better or worse," writes one newspaper commentator who has a large syndicate following, "our economic system is a very complicated one. Any measures which vitally affect money rock the whole structure. Sometimes months or even years elapse before the gears and flywheels have been readjusted to the new rhythm. And at this exact point up steps some litigant with an appeal to the Supreme Court and again there is fear of earthquakes."

"Even in such instances as an established policy is upheld there are long periods of doubt and uncertainty. If the Court is going to speak forever with the authority which it now possesses, it should at the very least, be obligated, to make its voice known at the time of the controversy, or forever after hold its peace." Heywood Broun, *The Columbus Citizen*, Jan. 23, 1935.

With dozens of laws before the Court and the interests of millions of people involved the time element becomes a matter of the greatest importance.<sup>23</sup> Thousands of miners watched with anxious care while the constitutionality of the Guffey bill remained unsettled; thousands of farmers were equally disturbed while the legal status of the Agricultural Adjustment Act remained in doubt; just as thousands of utility investors awaited the Court's decision on the holding company bill; and thousands of railroad workers awaited the outcome of the railroad pension bill. When hopes have been raised for great masses of people only to be dashed to the ground by a judicial veto, dissatisfaction is bound to arise; or if people are compelled to live in fear and uncertainty over a large period until the Court speaks, the result will be the same.

The time factor which troubles Mr. Heywood Broun, who speaks from one point of view, likewise disturbs Mr. James W. Beck, who speaks from quite another. Indeed, it is this matter more than anything else which causes him to support the advisory opinion. An ardent defender of the Constitution and the Supreme Court, he believes it highly important to strengthen public confidence in that body. The Supreme Court, he points out, has been the object of continuous attack from the beginning of the Republic, largely due to "the present exclusive method of deciding constitutional issues, whereby after a law has been enacted and acquiesced in, it is subsequently nullified, generally in the course of private litigation."<sup>24</sup> He cites the history of the Missouri Compromise, the Commodities Law, and the *Insular* Cases, in support of his contention.

The Missouri Compromise, it will be remembered, was effected in 1820, when Congress passed a law limiting slavery to certain portions of the Territories. It was acquiesced in by both political parties and was looked upon as a wise solution of

<sup>23</sup> *The Cleveland Plain Dealer*, Nov. 3, 1935.

<sup>24</sup> James M. Beck, "The Constitution and the Supreme Court," *The Law Student*, Vol. 2, Feb. 15, 1924, p. 1; *The Future of the Supreme Court*, p. 7.

a difficult problem. In 1857, in the Dred Scott Case, the Missouri Compromise was nullified by the Supreme Court. The voiding of this law was the signal for a bitter attack upon the Supreme Court. The effects of this unpopular decision were apparent for many a day.<sup>25</sup> The time factor in this case, the thirty-seven years involved, was responsible, in large part for this popular dissatisfaction.

The Commodities Law referred to, is the Hepburn Act enacted in 1906. This act forbids railroads to transport in interstate commerce commodities other than timber and its manufactures which they own in part or in whole, or in which they have an interest, direct or indirect, except when such commodities are needed and intended for their own use on common carriers. These provisions were subsequently upheld by the Supreme Court.<sup>26</sup> During the interval existing between the passage of the Act and the court's determination of its constitutional status, Mr. Wickersham, the Attorney General, assumed the power of suspending the law until the Supreme Court had acted.

But suppose says Mr. Beck, that "fearful that its validity might be sustained, the railroads had sold the mines at a loss of a thousand million dollars, and then ten years later, in a case between John Doe and Richard Doe the Supreme Court had decided the law was invalid. How could the railroads obtain any reparation for gigantic losses which they had needlessly sustained." This circumstance did not take place. "But for a year," Mr. Beck solicitously remarks, "its possibility hung as a heavy cloud over the business interests of the country and probably many timid investors parted with their securities to

<sup>25</sup> For an interesting discussion of the Dred Scott case, see Louis A. Boudin, *Government by Judiciary*, Vol. 2, pp. 1-31.

<sup>26</sup> *U. S. v. Delaware and Hudson Co.*, 213 U.S. 366; *U. S. v. Lehigh Valley Railroad Co.*, 220 U.S. 257; *D. S. and W. R. Co. v. U. S.*, 231 U.S. 363; *U. S. v. D. L. and W. R. Co.*, 238 U.S. 516; *U. S. v. Reading Co.*, 253 U.S. 26.

their irreparable loss.”<sup>27</sup> Once again he stresses the importance of the time factor.

The *Insular* Cases referred to were brought before the Supreme Court in 1901.<sup>28</sup> The problem here was to try to define the relations between the United States and the outlying territories acquired by the United States as a result of the war with Spain. Whether the constitution followed the flag was the question of the day. The question was brought to decision when certain importers resisted the collection of import duties on articles of merchandise coming from Porto Rico. For some time after Porto Rico had been officially ceded to the United States the government continued to collect duties on imports from the newly acquired territory, under the provisions of the Dingley Tariff Act, on the theory that it remained a foreign territory. In 1900 Congress passed the Foraker Act establishing a government for the island, and a schedule of duties different than those payable under the Dingley Tariff Act.

In 1901 the Supreme Court decided that after the cession of Porto Rico to the United States by Spain, the island ceased to be a “foreign country” and the Dingley Tariff Act was accordingly inoperative. Duties collected by the United States upon imports from Porto Rico after cession took place were therefore illegal exactions and must be returned. In a second case the Supreme Court held that although Porto Rico ceased to be a “foreign country,” it did not thereby become a part of the United States within the meaning of the revenue provision of the Constitution. In consequence, Congress was free to lay duties upon the importations from Porto Rico at such rates as it might deem proper.

<sup>27</sup> James M. Beck, the *Future of the Supreme Court*, p. 9. (Address delivered before the Pennsylvania Society of New York, Dec. 20, 1924).

<sup>28</sup> The two more important of these cases were *De Lima v. Bidwell*, 182 U.S. 1 (1901), and *Downes v. Bidwell*, 182 U.S. 244 (1901), dealing respectively with the questions: 1. Whether articles imported from Porto Rico before the passage of the Foraker Act were subject to duties under the Dingley Tariff Act; and 2. Whether the provisions of the Foraker Act imposing duties upon such imports were constitutional. See Boudin, *Government by Judiciary*, Vol. 2, pp. 261 ff.

While these decisions were pending hundreds of millions of dollars worth of merchandise were imported into the country while doubt and hesitation as to the legal status of the merchandise prevailed. "If Congress," says Mr. Beck, "before taking a leap in the dark could have asked an advisory opinion of the Supreme Court it could have avoided a possible injustice; but under our governmental method, due to the Montesquieu doctrine, Congress could only pass the law, take a leap in the dark and wait developments." Once again, he asserts, the time factor possessed large potentialities for evil.

In short, commentators Beck and Broun, speaking for a multitude of others, repeat the lament of Francis Bacon that "our laws as they now stand are subject to great incertainties." Like so many generations of men, they stress the need for legal certainty.<sup>29</sup> As they see it, periods of doubt as to the constitutionality of federal statutes affecting the most vital interests in American life, must be eliminated.<sup>30</sup> If the present system of judicial review is to continue they believe such issues must be clarified by the Supreme Court at an early date. This involves the adoption of the advisory opinion,<sup>31</sup> a development deemed inevitable by many students of the legal process. These students point to the twentieth century trend toward "preventive justice" in support of their view.<sup>32</sup> In the light of these circumstances it might be well to consider some of the possibilities that seem to accompany the practice.

At the outset it may be repeated that the adoption of the

<sup>29</sup> See Frank, *Law and the Modern*; Pound, *An Introduction to the Philosophy of Law*; Cardozo, *Paradoxes of Legal Science*; Demogue, *Analysis of Fundamental Legal Notions, Modern French Legal Philosophy*.

<sup>30</sup> Hans Kelsen, one of the greatest living jurists, asserts that the chief objection to the "l'exception d'inconstitutionnalite," or the American plan of judicial review, is the uncertainty and insecurity of the law which necessarily results from such practice. "La garantie jurisdictionnelle de la constitution," *Annuaire de l'Institut International le Droit Public*, Paris, 1929, cited by C. G. Haines, p. 601, *American Political Science Review*, Vol. XXIV, Aug., 1930.

<sup>31</sup> For a thorough analysis of the function of the advisory opinions see *Departmental Cooperation in State Government*, Albert R. Ellingwood, p. 253 (1918).

<sup>32</sup> See W. F. Willoughby, *Principles of Judicial Administration* (1929), pp. 85-88.



practice by the Supreme Court would effect no innovation in Anglo-American legal practice. It has been widely used in both England and in this country. Our Canadian neighbors have also had a long and interesting experience with this device.<sup>33</sup> In fact, the governor-general or either house of parliament may require the opinion of the Supreme Court of Canada upon any question of law or fact concerning the constitutionality of any dominion or provincial legislation or on any other matter which the governor in Council sees fit to submit.<sup>34</sup> Seven of the nine Canadian provinces likewise require their respective courts to answer similar questions.<sup>35</sup>

<sup>33</sup> Albert R. Ellingwood, *Departmental Cooperation in State Government*, pp. 79-93. In Canada, it should be said in passing, the practice of giving advisory opinions does not encounter the doctrine of the separation of powers. Neither does it have to concern itself with the problems arising out of the extremely wide scope of judicial review of legislation which prevails under our system. Despite this fact, the use of advisory opinions has encountered judicial opposition in Canada, just as it has in England. The practice has nevertheless been greatly reenforced by a comparatively recent decision of the Judicial Committee of the Privy Council. See *Attorney General for Ontario v. Attorney General for Canada*, (1912), (A.C. 571). The history of the Canadian practice in regard to advisory opinions appears in *In Re Sunday Leg.*, 35 Can. S. C. 581, (1905).

<sup>34</sup> See Revised Statutes of Canada, 1927, ch. 35, Sections 55-56; *Attorney General for Ontario v. Attorney General for Canada*, A.C. 571, 585, 586 (1912).

<sup>35</sup> It is interesting to note that several of the South American countries have also experimented with the advisory opinion practice. The constitution of Colombia (Constitution of 1886, Art. 90), and Panama (Constitution of 1904, Art. 105), provide for judicial participation in somewhat similar form. See J. I. Rodriguez, *American Constitutions*, Vol. 1, p. 278, 313, 375, 415; Vol. 2, pp. 336, 337 (1906-1907). When Hawaii was an independent state the practice was in vogue there also. (Const. of 1854, Art. 88). The Colombia provision is of some interest. The Constitution of Colombia of 1886, Art. 84, provides that the judges of the Supreme Court may take part in the legislative debates over "bills relating to civil matters and judicial procedure." And in the case of legislative acts which are objected to by the "government" as unconstitutional if the legislature insist on the bill, as against the veto of the government, it shall be submitted to the Supreme Court which is to decide the question finally. Arts. 70 and 150. See Professor Moses' Translation, supplement to *Annals of Am. Acad. of Pol. and Soc. Science* for Jan., 1893; see also 7 H.L.R. 139. A considerable use of the advisory opinion was also made in Germany under the Constitution of Weimar, in order to avoid the long delays and great inconveniences resulting from uncertainty as to the constitutionality of an act. See Johannes Mattern, *Principles of the Constitutional Jurisprudence of the German Republic*. (Baltimore, 1928), 257 ff.

The English practice, by which the Crown and the House of Lords consulted the judges on solemn occasions upon important questions of law, grew out of the close relations of the English judges to the Crown and to the House of Lords in those remote days when the political institutions of modern England were in a simpler, less differentiated state.<sup>36</sup> It will be recalled that the English king was the fountain of justice and the English national courts evolved from the *curia regis* as more specialization of function became imperative.<sup>37</sup> The king, and later the Privy Council, exercised the power, when acting in a judicial capacity, of consulting the judges.

When the present Judicial Committee of the Privy Council was created in 1833, it was given the duty of advising the Crown on legal questions.<sup>38</sup> The king's power to compel the attendance of his judges in the *curia regis* also gave rise to the practice of calling upon the judges to advise him in his executive capacity. From the time of Edward the First on, judges have been called upon to assist the House of Lords in both its judicial and legislative capacities.<sup>39</sup>

Although the practice has become so firmly fixed that the judges are bound to give such advice on questions of law arising in cases before the house,<sup>40</sup> the power has not been exercised frequently in the recent times. This is particularly so since the

<sup>36</sup> See *Certificate of Judges*, 2 Eden 371 (1760); *Head v. Head*, T.L.R., 138-146 (1823); *Ex Parte Kent Co. Council*, 12 B. 725 (1891); see also *Opinions of the Justices*, 126 Mass. 557, 561, 666.

<sup>37</sup> Van Vechten Veeder, *Advisory Opinions of the Judges of England*, 13 Harv. L. Rev. 358; see also J. F. Baldwin, *The King's Council in England during the Middle Ages*, (Oxford, 1913).

<sup>38</sup> 3 and 4 Wm. IV, C. 41.

<sup>39</sup> Since the Judicial Committee of the Privy Council has been set up, it is no longer necessary to call upon the judges when the opinion of the law lords is considered insufficient. Nevertheless, parliamentary acts passed in 1888 and 1920 have permitted calling upon the High Court for advice. See 51 and 52 Victoria Statutes, Vol. 25, ch. 41, sct. 29 (1888); 10 and 11 George V Statutes, Ch. 30, 1 (1920). Such legislation has been opposed by the judges however, and an attempt in 1928 to extend the practice was successfully opposed the law lords. See *Parliamentary Debates*, 5th series, Vol. IX, 755, 795, 914 (1928).

<sup>40</sup> *Blackstone's Commentaries*, Vol. 1, 168.

judicial functions of the House of Lords have been entrusted to the law lords.<sup>41</sup>

In this country a number of states have experimented with the practice.<sup>42</sup> Provisions for the rendition of advisory opinions by the justices of the supreme court on constitutional questions propounded by the governor or legislature are to be found in the constitutions of Massachusetts,<sup>43</sup> New Hampshire,<sup>44</sup> Maine,<sup>45</sup> Rhode Island,<sup>46</sup> Florida,<sup>47</sup> Colorado,<sup>48</sup> and South Dakota.<sup>49</sup>

The second Missouri constitution also adopted the device in 1865,<sup>50</sup> but it was dropped when the third Missouri constitu-

<sup>41</sup> Although the right of the House of Lords to ask the judges what the law is, in order to inform itself how the law should be altered has not been exercised recently, its existence was affirmed no later than 1912. Although the judges refused to answer questions not confined to the strict legal construction of existing acts of Parliament, they are compelled to give opinions on abstract questions of existing law. See *In Re The London and Westminster Bank*, 2 Cl. and F. 191, 193 (1934); *M'Naghten's Case*, 10 Cl. and F. 200 (1843); *Attorney General for Ontario v. Attorney General for Dominion*, A.C. 571, 586 (1912).

<sup>42</sup> Up to 1918, Mr. Ellingwood reports some 410 opinions requested and given in eight states. These opinions, he asserts, "have been received for the most part with all the deference accorded to the solemn decisions of a court of last resort. Both the legislative department and the executive department have usually treated the pronouncements of these opinions as final, and shaped their course of action accordingly." *Departmental Cooperation in State Governments*, 1918, p. 154. For a classification of these opinions see also 6 Am. and English Encyclopaedia, 1070-1078, (2nd Ed.).

<sup>43</sup> In 1780 the practice was introduced in the Massachusetts constitution (pt. 2, ch. 2, art. 2).

<sup>44</sup> In 1784, the provisions of the Massachusetts constitution were copied in the New Hampshire constitution of that year. (Now Art. 74, of the constitution of 1902).

<sup>45</sup> In 1820, the Massachusetts constitutional provisions on this subject were copied in the Maine constitution (Art. 6, Sec. 3).

<sup>46</sup> In 1842, the Massachusetts provisions were copied in the constitution of Rhode Island (Art. X, sec. 3). These provisions were reaffirmed in 1903 in Amendment XII, sec. 2.

<sup>47</sup> In 1868, the practice was adopted in the Florida constitution. This is now Art. IV, sec. 13.

<sup>48</sup> Constitution of 1886 (Art. VI, sec. III).

<sup>49</sup> Constitution of 1889 (Art. V, sec. XIII).

<sup>50</sup> Art. VI, sec. II.

tion was set up in 1875.<sup>51</sup> In Alabama<sup>52</sup> and Delaware<sup>53</sup> advisory opinions have been sanctioned by statute, without express constitutional authority.<sup>54</sup> In Vermont, a statute of 1864 authorizing advisory opinions was repealed in 1915.<sup>55</sup> In Minnesota a similar statute was also declared unconstitutional.<sup>56</sup> In earlier days advisory opinions were given in New York,<sup>57</sup> Pennsylvania,<sup>58</sup> Nebraska,<sup>59</sup> North Carolina,<sup>60</sup> and Oklahoma<sup>61</sup> without constitutional or statutory authorization but the practice has since been discontinued. In fact, the power to render advisory opinions has been explicitly denied by the highest courts in New York,<sup>62</sup> Nebraska,<sup>63</sup> North Carolina,<sup>64</sup> Connecticut,<sup>65</sup> and Ohio.<sup>66</sup>

<sup>51</sup> For a discussion of Missouri's experience, see Manley O. Hudson, *Advisory Opinions of National and International Courts*, 37 Harv. L. R. 970-1001 (1924).

<sup>52</sup> See Alabama Civil Code, Sections 10290-91 (1923); *Opinions of the Justices*, 209 Ala. 593 (1923).

<sup>53</sup> Revised Code of Delaware, ch. 13, sec. 2, ch. 110; sec. 11 (1915).

<sup>54</sup> A Delaware statute of 1852 has been ineffective until quite recently. See 1852, Del. Rev. Stat., ch. 27; see also *In re school Code of 1919*, 30 Del. 406, 108 Atl. 39.

<sup>55</sup> See Vermont Laws, 1915, No. 84.

<sup>56</sup> *Matter of the Senate*, 10 Minn. 78 (1865).

<sup>57</sup> See *People v. Green*, 1 Den. (N.Y.) 614, (1845).

<sup>58</sup> See 3 Binney (Pa.), 595 (1908).

<sup>59</sup> In Nebraska the practice existed without either constitutional or statutory sanction. It no longer obtains. See *In Re R. R. Commissioners*, 15 Neb. 67, 50 N.W. 276 (1884); *In Re School Funds*, 15 Neb. 684, 50 N.W. 272 (1884); *In Re Babcock*, 21 Neb. 500, 32 N.W. 641 (1887); *In Re State Warrants*, 25 Neb. 659, 41 N.W. 636 (1889); *In Re Senate File 31*, 25 Neb. 864, 41 N.W. 846 (1889); *In Re Quære of Procedure of Two Houses of Legislature in Contests of Election of Executive Officers*, 31 Neb. 262, 47 N.W. 923 (1891); *In Re House Roll 284*, 31 Neb. 505, 48 N.W. 275 (1891). For a critical discussion of the Nebraska practice see the dissenting opinion of Justice Norval in, *In Re Board of Public Lands and Buildings*, 37 Neb. 425 (1893). The Nebraska practice was apparently discontinued in 1898 by rule of the Supreme Court, 52 Neb. XVIII, Rule 32.

<sup>60</sup> *Opinions of the Justices*, 64 N.C. 785, 792 (1870).

<sup>61</sup> *In Re Opinion of the Judges*, 189-198, 17 Okl. Cr. 369 (1920); *In Re Opinions of the Judges*, 195 P. 149, 18 Okl. Cr. 366 (1921).

<sup>62</sup> *Matter of State Industrial Commission*, 224 N.Y. 13 (1918).

<sup>63</sup> *Re Board of Public Lands*, 37 Neb. 425 (1893).

<sup>64</sup> *Opinion of the Justices*, 64 N.C. 785, 792 (1870).

<sup>65</sup> *Reply of the Judges*, 33 Conn. 586 (1867).

<sup>66</sup> *State v. Baughman*, 38 Ohio St. 455 (1882).

The Massachusetts experiment is the most interesting and possibly the most significant.<sup>67</sup> In 1780, it was incorporated in the constitution. In 1781, the first opinion was given.<sup>68</sup> Since then approximately one hundred and fifty opinions have been rendered<sup>69</sup> and two efforts to secure the repeal of the advisory practice have been defeated. The first attempt at repeal was made in the constitutional convention of 1820 and was sponsored by some of the greatest lawyers of that day.<sup>70</sup> Although the convention favored repeal, the people refused to adopt this view.

<sup>67</sup> Frederick Grinnel, *The Duty of the Court to Give Advisory Opinions*, 2 Mass. L. Quar. 542-552 (1917).

<sup>68</sup> *Opinions of the Justices*, 126 Mass. 547 (1789); for a review of Massachusetts precedents as well as early English precedents, see *Opinions of Justices*, 126 Mass. 557, 561, 566 (1789).

<sup>69</sup> " \* \* \* it was ninety-seven years after the adoption of the constitution of Massachusetts before the judges declined to answer. (1877, 122 Mass. 600 et seq.). Former judges who had sat in the constitutional conventions of 1788-90, 1820, and 1853, were all of the opinion that the judges were bound to answer the questions proposed to them by either department." Hugo Dubuque, *The Duty of Judges as Constitutional Advisers*, 24 Amer. L. Rev. 391-392 (1890).

<sup>70</sup> "In 1820, forty years after the constitution of Massachusetts was adopted, a constitutional convention was held to revise it. Many of its prominent members had been contemporaries of the constitution of 1780. Among the eminent lawyers who participated in that convention were, Isaac Parker, then chief justice of the Supreme Judicial Court; Lemuel Shaw, his immediate successor; Levi Lincoln, afterwards judge of the same court and elected governor; Charles Jackson, then on the supreme court bench of the state; Joseph Story, the eminent author, then associate justice of the United States Supreme Court; John Adams, the ex-president, who had drafted the original constitution; Robert Rantoul, and Daniel Webster." (Journal of Deb. and Proc. Mass. Convention 1820, p. 5 et seq. See also J. Story's *Life and Letters*, 386 et seq. (ed. 1851). C. J. Parker sat on Supreme Bench of Mass. from 1814 to 1830; C. J. Shaw from 1830 to 1860; J. Jackson, from 1813 to 1823; J. Lincoln from 1824 to 1825). An attempt was made in that convention to repeal the clause authorizing the reference of questions to the judges. Judge Story, who was chairman of the committee on the judiciary of which C. J. Shaw and J. Lincoln were also members, made a report on the questions criticizing the reference of questions to judges. In discussing the questions before the convention, Judge Story further criticized the practice. In their address to the people the constitutional convention went on record as opposed to the practices. Although the convention favored the repeal, the people refused to adopt their view. Hugo Dubuque, *The Duty of Judges as Constitutional Advisers*, 24 Amer. L. Rev. 391-393 (1890).

In 1853, another constitutional convention was assembled.<sup>71</sup> A second attempt was made to eliminate the advisory practice by distinguished members of the legal profession.<sup>72</sup> Among other arguments presented were criticisms that the provision was in conflict with the Declaration of Rights, which expressly provided for the independence<sup>73</sup> and the separation of the sev-

<sup>71</sup> *Debates Massachusetts Conventions*, 1853, p. 4 (Boston, 1853).

<sup>72</sup> "Among the eminent lawyers of this convention were the late Sidney Bartlett, Rufus Choate, Marcus Morton, Jr., the present chief justice of Massachusetts, and his father, Marcus Morton, Sr., who had been on the supreme bench from 1825 to 1840, when he was elected governor; Robert Rantoul, who sat in the convention of 1820; the late Otis P. Lord, afterwards judge of the Supreme Court from 1875 to 1882; Professor Simon Greenleaf, the famous author of the work on Evidence, etc.; Benjamin F. Butler; P. Emory Aldrich (then) judge of the Massachusetts Supreme Court and author of a valuable work on equity; Charles Sumner and Henry L. Dawes, United States senators; and Joel Parker, formerly chief justice of the New Hampshire Supreme Court." The then chief justice of Massachusetts offered a resolution in the convention for the repeal of the section requiring the judges to advise the departments. The chairman of the judiciary committee also made a report in favor of repeal which was unanimously concurred in by the committee, which included Judge Lord, Sidney Bartlett, and Simon Greenleaf. Hugo Dubuque, *The Duty of Judges as Constitutional Advisers*, 24 Amer. L. Rev. 393-395 (1890).

<sup>73</sup> This opinion was apparently not shared by the men who adopted the Massachusetts constitution of 1780. These men were strongly in favor of the independence of the judiciary. In fact the dependence of colonial judges upon the Crown was one of their chief causes of complaint against the English government. John Adams, second president of the United States, who drafted the Constitution of Massachusetts, was particularly active in advocating the necessity of the independence of the judiciary. In 1773, he had a strong controversy on this point with one General Brattle. Referring to his arguments in his diary, he said: "These papers accordingly contributed to spread correct opinions concerning the importance of the independence of the judges to liberty and safety and enabled the convention of Massachusetts in 1779 to adopt them in the constitution of the commonwealth. \* \* \* The principles developed in these papers have been generally, indeed, almost universally prevalent among the American people from that time." See J. Adams, *Life and Works*, pp. 316, 317. Samuel Adams was also a great advocate of the independence of the judiciary. See Samuel Adams, *Life and Works*, pp. 80 et seq. In short, there is considerable evidence to support the assumption that the framers of the Massachusetts constitution of 1780, did not believe that the clause requiring the judges to give advice to the other departments interfered with the independence of the judiciary. See Hugo Dubuque, *ibid*, pp. 373-374.

eral branches.<sup>74</sup> It was also argued that judges might be drawn "into the vortex of politics"; that they might be called upon "to decide questions of law affecting private rights without the parties \* \* \* having an opportunity of being heard"; that the "judges' decisions might deeply affect the rights of individuals without their having the opportunity to be heard";<sup>75</sup> that the

<sup>74</sup> In the constitutions of most states, writes Hugo Dubuque, there is an express provision to the effect that the three coordinate branches of the government shall be independent of each other, and where it is not so provided, he adds, a distribution of power is so defined as to be tantamount to an express provision to that effect. But he points out that in seven states the judges are required to give opinions to the other departments under the constitution. This demonstrates, he contends, that it was never meant that such requirement should conflict with the principle of the absolute separation of the three branches. "When their opinions are requested under the constitution," he says, "the judges become the constitutional advisers of the other department; and their opinions have not the binding force of adjudications, like decisions given by them in the regular course of judicial proceedings. In other words, they do not give their opinion as a court, but they act individually, as official advisers, in the same manner as the judges in England become the King's counsel or advisers, in matters of law, when called upon to assist the king or the House of Lords." (1 Cooley's Blackstone, 229; 1 Coke's Int. 110. See the valuable pamphlet of Professor J. B. Thayer, *Legal Effect of Opinions of Judges*, Boston, 1885). Hugo Dubuque, *ibid.*, p. 374.

<sup>75</sup> In the case of *State v. Baughman*, 38 Ohio St. 455 (1882), the Supreme Court of Ohio held that it was limited in its power to the decision of such questions as properly arise in the due course of law, in a judicial proceeding within its jurisdiction and Judge Johnson speaking on the matter of advisory opinions repeated many of the arguments used above. He said in part, "To be a judicial settlement the question decided must arise in a judicial proceeding, properly before a court of competent jurisdiction. The division of the powers of the state into legislative, executive, and judicial, and the confiding of these powers to distinct departments is fundamental.

"It is essential to the harmonious working of this system that neither of these departments should encroach on the powers of the other. If the judiciary were to assume to decide hypothetical questions of law not involved in a judicial proceeding in a cause before it, even though the decision would be of great value to the general assembly in the discharge of its duties, it would nevertheless be an unwarranted interference with the functions of the legislative department that would be unauthorized and dangerous in its tendency. Not only this, but it would be an attempt to settle questions of law involving the rights of persons without parties before it, or a case to be decided in due process of law, thus violating that provision of the Bill of Rights which declares that every person shall have a remedy for an injury done him by due course of law."

judges were "called upon to give an opinion when loaded down with labor"; that "the judges have to put off all other things and attend to this, as well as they may, without a hearing, without argument, and without time to investigate the authorities."

The voters of Massachusetts, apparently, were not impressed with the weight of these contentions, for when the question of repealing the advisory opinion clause was submitted to them at the polls it was defeated, and the constitution of Massachusetts stands on this question today as it did in 1780 when it was originally adopted.<sup>76</sup>

The Massachusetts experiment takes on an increased interest, when observed in the light of our national experience. The contrast is striking. At a very early date in our national history it was decided that the doctrine of the separation of powers and the nature of the federal judicial power, would prevent the imposition of the practice upon the Supreme Court of the United States. An attempt was made in the federal convention of 1787 to confer upon the executive and Congress the right to require opinions from the Supreme Court.<sup>77</sup> This attempt failed.

<sup>76</sup> "It is worthy of note," writes Hugo Dubuque in 1890, "that notwithstanding what has been said against this provision, in and out of the Conventions, it has stood the test for one hundred and nine years in the Massachusetts constitution, and we are yet to be referred to the harm which has resulted from its application. The possibility of an abuse is an argument for the enactment of repeal, but not for a particular construction of a law. In one instance alone has an extra-judicial opinion in Massachusetts been reversed. (*Op. Justices*, 8 Mass. 547. The judges here held that even when the president called out the militia under U. S. Const., Art. 2, sec. 2, the several governors could judge for themselves of the exigency, as chief commanders of the State's militia. Such a view in the face of the clear provision of the U. S. Constitution could not stand. See *Martin v. Mott*, 12 Wheat. 19). But many more judicial opinions in cases assigned during the last century have suffered the same fate; and that, too, at the hands of the same court and often of the same judges. (See Bigelow's *Overruled Cases*, Williams' *Mass Citations*; Desty's *Federal Citations*)." Dubuque, *Ibid.*, pp. 393-395.

<sup>77</sup> See Max Farrand, *Records of the Federal Convention*, 3 Vols. (New Haven, 1911, Vol. II, p. 341). The clause, which was proposed by Mr. Pinkney, was a verbatim copy of the corresponding part of the Massachusetts convention adopted seven years before. It read as follows: "Each branch of the legislature as well as the Supreme Executive shall have the authority to



Although the constitution did not impose the duty upon the Court, President Washington, who presided over the Constitutional Convention, deemed it quite proper to request an advisory opinion in 1793.<sup>78</sup> Apparently he was not certain about the matter until Chief Justice John Jay declined to accede to his request.<sup>79</sup> The incident arose out of the difficulties resulting from Citizen Genet's handling of the *Little Democrat* in defiance of the American government. At a meeting of the cabinet, require the opinions of the Supreme Court upon important questions of law, and upon solemn occasions." Nothing came of this attempt however. See 1 Elliot, *Debates on the Federal Constitution*, 250. In the Federal Constitution of 1787 while the power of declaring laws unconstitutional was recognized, the limits of the power were also admitted. "In trying to make the judges revise all legislative acts before they took effect, James Wilson pointed out that laws might be dangerous and destructive, and yet not so unconstitutional as to justify the judges in refusing to give them effect. 5 Elliot Debates, 344." J. B. Thayer, *The Origin and Scope of the American Doctrines of Constitutional Law*, 7 Harv L. Rev., 140-141 (1893). See also Madison's *Journal of the Federal Convention*. (Scott's ed.) 558-559.

<sup>78</sup> Charles Warren asserts that while the impression was prevalent at that time that the President had the right to seek the opinion of the judges on questions of law, his move to do so, was the cause of much adverse criticism in the Pro-French newspapers, one of which commented as follows: "It is said that the judges have convened to assist the understanding of our executive on the treaty between France and the United States. It is strange that lawyers should be supposed capable of deciding upon common sense and plain language; for such is the treaty." (*National Gazette*, July 29, 1793, letter signed 'Jubal'.) *The Supreme Court in United States History*, Vol. 1, p. 109.

<sup>79</sup> In 1790 Chief Justice Jay indicated his unwillingness to permit the Court to express its judicial opinion except in a case litigated between parties in a regular judicial proceeding. The incident occurred when Alexander Hamilton, then secretary of the treasury, suggested that all the branches of the government express opposition to the Virginia Resolutions. "At this time," writes Charles Warren, "excitement ran high, both in Congress and in the Nation, over the projected legislation for assumption of State debts and redemption of the public debt. The Virginia House of Representatives had passed Resolutions terming the latter bill as 'dangerous to the rights and subversive to the interests of the people and demands the marked disapproval of the General Government,' and denounced the bill as 'repugnant to the Constitution of the United States, as it goes to the exercise of a power not expressly granted to the General Government.'

"This is the first symptom," writes Hamilton, 'of a spirit which must either be killed or it will kill the Constitution of the United States. I send the resolution to you that it may be considered what ought to be done. Ought not the collective weight of the different parts of the Government to be

writes John Marshall, it was determined "to request the answers of the judges of the Supreme Court of the United States to a series of questions comprehending all the subjects of differences which existed between the executive and the minister of France relative to the exposition of the treaties between the two countries."<sup>80</sup>

In accordance with this plan, Jefferson wrote a letter<sup>81</sup> on July 18, 1793, asking the judges whether the President might seek their advice on questions of law.<sup>82</sup> Some twenty-nine questions were submitted to the judges at this time. On August 8, 1793, the justices refused to grant the request.<sup>83</sup> They found "strong arguments against the propriety of our extra-judicially employed in exploding the principles they contain? This question arises out of sudden and undigested thought."

"Jay replied in cool and restrained language that he considered it undesirable to take any action! 'Having no apprehension of such measures, what was to be done appeared to be a question of some difficulty as well as importance. To treat them as very important might render them more so than I think they are. The assumption will do its own work; it will justify itself and not want advocates. Every indecent interference of State Assemblies will diminish their influence; the National Government has only to do what is right, and if possible, be silent. If compelled to speak, it should be in few words, strongly evinced of temper, dignity, and self-respect.'" *The Supreme Court in United States History*, Vol. 1, pp. 52-53. On p. 110 of the same book, however, are newspaper reports that would seem to indicate that John Jay did grant something in the nature of an advisory opinion in 1792. According to this report the Trustees of the National Sinking Fund comprising the Vice-President, the Secretary of State, Treasury, Attorney General, and the Chief Justice asked from Chief Justice Jay an opinion as to the constitutionality of the law, and Jay rendered a written opinion, March 31, 1792, *N. Y. Daily Adv.*, March 9, 1793.

<sup>80</sup> John Marshall, *Life of George Washington*, pp. 432-441.

<sup>81</sup> Warren, *The Supreme Court in United States History*, Vol. 1, p. 108.

<sup>82</sup> Jared Sparks, *Writings of George Washington*, 12 Vols., Boston, 1834-1838, Vol. X (1836), appendix XVIII; Charles Warren, *The Supreme Court in United States History*, Vol. 7, pp. 108 *et seq.*; *Muskrat v. United States*, 219 U.S. 346, 354 (1911).

<sup>83</sup> It is interesting to note that the twenty-nine questions asked were difficult to answer, coming as they did in a time of high political excitement, when passions were at a fever heat. Professor Thayer suggests that if the questions had been "brief and easily answered the Court might, not improbably, have slipped into the adoption of a precedent that would have engrafted the English usage upon our national system." Thayer, *Legal Essays*, p. 54.

deciding the questions alluded to, especially as the power given by the constitution to the President, of calling on the heads of departments for opinions seems to have been purposefully as well as expressly united to the executive departments.<sup>84</sup>

"Considering themselves merely as constituting a legal tribunal for the decision of controversies brought before them in legal form," wrote John Marshall, "those gentlemen deemed it improper to enter the field of politics by declaring their opinions on questions, not growing out of the case before them."<sup>85</sup> Since that time the Supreme Court has refused to give such opinions, even when they are brought forward in the guise of formal legislation.<sup>86</sup> It limits its work to actual litigation *inter partes*. It bases its policy on its conception of the requirements of the separation of powers, and on the constitutional provision as to the "judicial power," which extends to "cases and controversies."<sup>87</sup> Its consideration of constitutional matters is accordingly limited to the determination of questions arising in liti-

<sup>84</sup> *Correspondence and Public Papers of John Jay*, Vol. III, 488, 489.

<sup>85</sup> John Marshall, *Life of George Washington*, p. 441.

<sup>86</sup> See a series of decisions from *Hepburn's Case*, 2 Dall, 409 (U.S.) 1792 to *Muskrat v. United States*, 219 U.S. 346 (1911); Burdick, *Law of the American Constitution*, (1924), pp. 132-135. The High Court of Australia also refuses to render "advisory opinions," for similar reasons. See *Luna Park Ltd. v. Commonwealth of Australia*, 32 Comm. L. R. 596 (1923).

<sup>87</sup> "The Federal Judiciary can be called upon to decide controversies brought before them in legal form; and therefore are bound to abstain from any extra-judicial opinions upon points of law, even though solemnly suggested by the executive." Story's *Commentaries on Constitution*, 5th ed. sec., 1571. See also *Muskrat v. United States*, 219 U.S. 346, 356 (1911), in which Mr. Justice Day says: "The exercise of the judicial power is limited to 'cases' and 'controversies'. Beyond this it does not extend and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred." See comment by Charles E. Hughes in 45 Amer. Bar. Assn. Reports, 266. For an interesting discussion of the American practice by a Canadian jurist who opposes the advisory opinion see the remarks of Justice Idington in *In the Matter of a Jurisdiction of a Province to Legislate Respecting Abstention from Labour on Sunday*, 35 Can. Supreme Court, 581 (1905), (Reference by Governor General in Council), at p. 604.

gated cases.<sup>88</sup> However, it has never been difficult to raise a test case.<sup>89</sup>

It is interesting to speculate as to what the result would have been if the court, in the words of Thayer, had "slipped in" to the practice of rendering advisory opinions in 1793. Some observers believe that if the practice had been adopted the Supreme Court would have been dragged into one political controversy after another and would have suffered a terrific loss of prestige as a result.<sup>90</sup> Other observers, including Mr. Beck,

<sup>88</sup> James M. Beck asserts that the Supreme Court gave an advisory opinion in the administration of President Monroe on the question as to the power of the Federal Government to make appropriations for improvements wholly within a state. *The Future of the Supreme Court*; an address delivered at the *Annual Dinner of the Pennsylvania Society of New York*, Dec. 20, 1924, p. 16. (Pamphlet published by Allen, Lane, and Scott, Philadelphia).

<sup>89</sup> Mr. Beck points out that as early as Washington's Administration the "test" case was in use. At that time Alexander Hamilton wanted to secure the opinion of the Supreme Court as to the nature of a direct tax. With that object in mind he created a fictitious case of a supposed owner of 125 "chariots" and the Government paid the counsel for both parties. James Beck, *ibid.*, p. 15. Mr. Walter F. Dodd in discussing the steadily increasing number of cases involving constitutional questions as they affect state government says: "In view of the increased frequency with which Courts pass upon the validity of statutes, it is natural that they should have weakened the early doctrine that the question of constitutionality should be decided only as an incident to the determination of a *bona fide* controversy between parties. For a number of years, questions of constitutionality have been largely decided in cases where a person adversely affected by a statute seeks an injunction to prevent its enforcement, or where a person beneficially affected seeks a mandamus to compel action under the statute. The issue of constitutionality in most cases of this kind is the sole issue presented for the Court's determination, and *the case is made for the sole purpose of determining that issue.*" (This attitude is indicated by the United States Supreme Court in *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925). There the court permitted the use of an injunction to contest the validity of a New York law punishing persons who sought to sell "kosher" meat when it was not actually such. Declaratory judgment acts are now coming to be used in the same manner as injunctions). This is now well recognized by counsel in almost all of the cases involving the validity of important statutes. Instead of being an incident, the issue as to the validity of the statute is the whole case. Dodd, *State Government* (2nd Ed.), 1928, p. 129.

<sup>90</sup> "By the firm stand thus taken at so early a stage in the career of the new Government, and by declining to express an opinion except in a case duly litigated before it, the Court established itself as a purely judicial body; and its success in fulfilling its function has followed its adhering to this exclusive method of deciding questions of law and of the constitutionality of statutes." Warren, *The Supreme Court in United States History*, Vol. I, p. III.

believe the adoption of the practice would have worked incalculable gain for the nation. "Massachusetts," says Mr. Beck, "has had this procedure for more than a century and its highest court, far from losing its prestige and reputation, ranks second to none among the State judiciaries."<sup>91</sup> "One such fact," he adds, "is worth a thousand theories."<sup>92</sup>

The procedure required would be simple enough if the Massachusetts practice were to be followed. The President, by written request, or either house of Congress by resolution, could submit to the judges of the Supreme Court a number of questions affecting a proposed measure or action. Answers could be given by the judges collectively or *seriatim*. In giving these answers the justices would not be acting as a court,<sup>93</sup> but as the constitutional advisers of the other departments of government.<sup>94</sup> The opinions given would be those of the individual judges and not the opinion of the Court.<sup>95</sup> They would not be binding in later litigation under the rule of *stare decisis* but would undoubtedly be considered carefully and exercise a strong influence upon the court's action.<sup>96</sup> Moreover, the judges could

<sup>91</sup> James M. Beck, *The Future of the Supreme Court*, p. 21.

<sup>92</sup> James M. Beck, *The Future of the Supreme Court*, p. 21.

<sup>93</sup> In Colorado, it is claimed that the judges act as a court. This is at variance with the practice elsewhere. See *In Re Senate Res.*, 12 Col. 466, 21 Pac. 479 (1889); see also *Green v. Comm.*, 12 Allen (Mass.) 155 (1886); *Answer to the Justices*, 95 Me. 564, 51 Atl. 224. See J. B. Thayer, *The Nation*, Dec. 12, 1889, pp. 476-477.

<sup>94</sup> "There is a well-defined distinction between judges acting as a court and in the capacity of an adviser. The former adjudicates, settles, and decides; the latter gives an opinion upon questions propounded, *he throws upon them the light of his learning*. (See Legal Effect of Opinions by Judges, by Prof. J. B. Thayer, Dean of Harvard Law School, 1885). The moment a court ventures to substitute its own judgment for that of the legislature in any case where the constitution has vested the legislature with power over the subject-matter, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference. (Cooley's Const. Lim., 201 and cases cited). And there is great force in the statement of Judge Cooley, that 'courts, (judges) cannot run a race of opinions upon points of right, reason and expediency with the law-making power.' (*ibid*, p. 204." Hugo Dubuque, *ibid*, pp. 395-396.

<sup>95</sup> See *Reply of Judges of the Supreme Court to the General Assembly*, 33 Conn. 586.

<sup>96</sup> See *Loring v. Young*, 239 Mass. 349, 361 (1921).

refuse to express an opinion when they saw fit. At least, judges in Massachusetts,<sup>97</sup> Maine,<sup>98</sup> Missouri,<sup>99</sup> and Colorado,<sup>100</sup> have frequently exercised the right to pass upon the reasonableness of the demand made upon them. Furthermore, the Supreme Court could limit the scope of its duty in this connection by requiring that no private rights be involved;<sup>101</sup> that the question be *publici juris* and framed with sufficient definiteness; that no questions of fact be in issue;<sup>102</sup> and that no question of a nature affecting private interests be considered.<sup>103</sup>

While the procedural requirements of the practice present little difficulty, it is not so clear that the adoption of the practice in 1793 would have worked the beneficial results claimed for it. When it is argued that the practice permits the prompt settlement of legal doubts and avoids the waste of enacting legislation which the courts subsequently invalidate, it is assumed, apparently, that the Supreme Court's opinions in advance of legislation will grind out controlling legal principles, which will resolve all doubts for good and all.<sup>105</sup> But the workings of the

<sup>97</sup> *Answer of the Justices*, 148 Mass. 623 (1889).

<sup>98</sup> *Answer of the Justices*, 95 Me. 564 (1901).

<sup>99</sup> *In re N. Mo. Ry.*, 51 Mo. 586 (1873).

<sup>100</sup> *Interrogatories of the Senate*, 54 Col. 166 (1913).

<sup>101</sup> *Opinion of the Court*, 62 N.H. 704 (1816); *Opinions of the Justices*, 190 Mass. 611 (1906).

<sup>102</sup> *Dinan v. Swig*, 223 Mass. 516 (1916).

<sup>103</sup> *In re Opinion of the Judges*, 43 S. Dak. 645, 647 (1920).

<sup>105</sup> Judge Hutcheson points out some of the obstacles encountered by those searching for "perfect formulas, fact proof, concepts, so general, so flexible, that in their terms, the jural relations of mankind can be stated." *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 Corn. L. Q. 274. "The law always has been, is now, and will ever continue to be, largely vague and variable. And how could this be otherwise? The law deals with human relations in their most complicated aspects. The whole confused, shifting, helter-skelter of life parades before it—more confused than ever, in our kaleidoscopic age."

"Even in a relatively static society, men have never been able to construct a comprehensive, eternized set of rules anticipating all legal disputes and settling them in advance. Even in such an order, no one can foresee all the future permutations and combinations of events; situations are bound to arise which were never contemplated when the original rules were made. How much less is such a frozen legal system possible in modern time." Jerome Frank, *Law and the Modern Mind*, p. 6.

American constitutional system does not seem to bear this out. The record there shows clearly that attempts to deal with constitutional questions abstractly are bound to meet difficulties and result in conclusions that are quite unrelated to actuality.

For constitutionality, as Felix Frankfurter points out, is not a fixed quality, nor can it ever be so.<sup>106</sup> A completely frozen constitutional content would require an "infinite immobility of society."<sup>107</sup> We have never had that, and never will. We live in a world of change. "If a body of law were in existence adequate for the civilization of today," says Justice Cardozo, "it could not meet the demands of the civilization of tomorrow."<sup>108</sup> Constitutional content is necessarily variable.<sup>109</sup> It is being constantly overhauled, and adapted to the realities of ever-changing social, industrial, and political conditions.<sup>110</sup> In consequence, some of the most important cases decided by the Court are resolved into a judgment upon the facts. The cases which are frequently most important are concerned not with legal principles, but the application of admitted principles to complicated and elusive facts.<sup>111</sup>

The truth of this statement can be best realized by a "study of the two thousand odd cases which have spun meaning out of the Delphic phrase 'without due process of law'."<sup>112</sup> The method of the Court in these cases is the empirical one of pricking out a line by the "gradual approach and content of decisions

<sup>106</sup> Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1004-1005 (1924).

<sup>107</sup> Demogue, *Analysis of Fundamental Legal Notions*, Vol. 7, Modern Legal Philosophy Series, p. 445.

<sup>108</sup> Cardozo, *Paradoxes of Legal Science*, pp. 10-11.

<sup>109</sup> "New instruments of production, new modes of travel and dwelling, new credit and ownership devices, new concentrations of capital, new social customs, habits, aims, and ideals—all these factors of innovation make vain the hope that definite legal rules can be drafted that will forever after solve all legal problems." Jerome Frank, *Law and the Modern Mind*, p. 6.

<sup>110</sup> Rexford G. Tugwell, "The Ideas Behind the New Deal," *New York Times Magazine*, July 16, 1933.

<sup>111</sup> Frankfurter, *ibid.*, pp. 1004-1005.

<sup>112</sup> See Frankfurter, *ibid.*, pp. 1004-1005; see also Charles M. Hough: *Due Process of Law Today*, 32 Harv. L. Rev. 218.

on the opposing side";<sup>113</sup> or defining by a gradual process of "inclusion and exclusion."<sup>114</sup> Indeed there is small choice in the matter. The constitutional questions raised here cannot be solved in terms of vague abstractions.<sup>115</sup> Broad and indeterminate concepts like "due process" and "liberty" take on meaning only when construed in terms of human facts.

The same principle operates when we attempt to ascertain the nature, scope, and limitations of the "commerce" clause; involving as it does the delicate problem of dividing power between the state and nation.<sup>116</sup> The "commerce" clause from *Gibbons v. Ogden* in the days of the steamship to the *Schechter* case in the days of the aeroplane has had a highly variable meaning.<sup>117</sup> Since cases involving the "due process" clause and the "commerce" clause have been the most prolific source of litigation for the Supreme Court since the Civil War,<sup>118</sup> the conclusion is inescapable, that the stuff of most of our constitutional controversies are facts and judgments upon facts; and that it would be impossible to resolve them in the dim, nebulous, half-world of abstraction.<sup>119</sup>

<sup>113</sup> *Noble State Bank v. Haskell*, 219 U.S. 104 (1911).

<sup>114</sup> *Hurtado v. Calif.*, 110 U.S. 516 (1880).

<sup>115</sup> "Concepts like 'liberty' and 'due process of law' are too vague in themselves to solve issues. They derive meaning only if referred to adequate human facts. Facts and facts again are decisive. They are either present-day facts, or ancient facts clothed by the universalizing instinct of man to look like principles. Not the least of constitutional exploded facts persisting as legal assumptions." Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1004-1005 (1924).

<sup>116</sup> Mr. Walter Lippman has discussed some of the difficulties involved in any attempt to reduce to writing a distribution of power between the states and the nation within the federal system, that will be clearly definitive. "A Way to Commit Suicide," *Today*, July 27, 1935. See also, Raymond Moley, "A Reply to Mr. Lippman," *Today*, August 3, 1935. For Mr. Lippman's rebuttal, see "A Reply," *Today*, August 31, 1935. For Mr. Moley's suggestion with regard to a constitutional amendment, see "Beyond the NRA," *Today*, June 8, 1935.

<sup>117</sup> Walter Lippman, "A Reply," *Today*, August 31, 1935, p. 3.

<sup>118</sup> Frankfurter and Landis, *The Business of the Supreme Court*.

<sup>119</sup> "The reports are strewn with wrecks of legislation considered in *vacuo* and torn out of the context of life which evoked the legislation and alone made it intelligible. (See Roscoe Pound, *Liberty of Contract*, 18 Yale



Another weakness of the practice is discernible when questions are submitted to the judges with regard to the validity of proposed legislation. Legislation by the very nature of things is an experimental process. Engaged in the difficult task of contriving a design for the future, legislators largely base their efforts on probabilities. "Every year, if not every day," remarks Justice Holmes, "we have to wager our salvation upon some prophecy based upon imperfect knowledge."<sup>120</sup> This certainly applies to the work of legislators. Building on their hopes and fears and not on demonstrated facts, they need every opportunity for putting their prophecies to a test. But when the question of the constitutionality of proposed legislation is submitted to the judges for an advisory opinion, rather than the question of the validity of the finished statutory product which has passed through the "beneficent ordeal" of public discussion, legislative debate and analysis, plus deliberate enactment, they are not receiving that opportunity.

In this circumstance the judges are considering legislative doubts rather than legislative convictions. This procedure, Felix Frankfurter believes, deprives the legislator of his fullest creative opportunity, since facts may be established in favor of measures after their enactment which could not possibly be brought forward previous to that time.<sup>121</sup> "Nothing changes

L. J. 454; Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 Harv. L. Rev. 353). These are commonplaces. But they are the heart of the matter of American constitutional law. A failure scrupulously and persistently to observe these commonplaces jeopardizes the traditional American constitutional system more than all the loose talk about "usurpation." (Lack of historical scholarship, combined with fierce prepossessions, can alone account for the persistence of this talk. One would suppose that, at least, after the publication of Beard, *The Supreme Court and the Constitution*, there would be an end to this empty controversy." Frankfurter, *A Note on Advisory Opinion*, 37 Harv L. Rev. 1002-1003 (1924).

<sup>120</sup> *Abrams v. U. S.*, 250 U.S. 623; Lief, *The Dissenting Opinions of Mr. Justice Holmes*, p. 50.

<sup>121</sup> Mr. Frankfurter points out that the accidents of litigation may give time for the vindication of laws which *a priori* may run counter to deep prepossessions, or speculative claims of injustice. He calls attention to *National Union Fire Insurance Co. v. Wanberg*, 260 U.S. 71, 77 (1922), where it was said: "The statute here in questions has been enforced since 1913, and

more easily than statutes intended by their own expressions to be eternal," says Demogue, "for nothing runs greater risk of becoming out of date, of accommodating itself badly to new circumstances."<sup>122</sup> This rule works both ways, however, and time may vindicate some statutes which might have been choked out at the beginning by an advisory opinion which could not hope to foresee all the possibilities involved.

Another defect of the practice concerns the technique involved. It is one thing to appraise the validity of legislation, or legislative authority, in the ordinary process of adjudication; and something quite different to attempt the same task by the advisory practice. In all jurisdictions, jurists faced with the perplexing problem of formulating an opinion in advance of litigation have forcibly expressed the inadequacy of their position. Their statements have such a convincing ring that one wonders whether an opinion given in such an unfavorable atmosphere would not cause more damage to all concerned than the slower moving practice of testing the measure after it was on the books.<sup>123</sup> If in the one case there are wastes involved in

it does not seem to have driven companies out of the hail insurance business, an indication that they are able profitably and safely to adjust themselves and their methods to its requirements." *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1005-1006 (1924). Incidentally, it may be remarked that some observers assert that the strategy of New Deal lawyers in delaying decision of constitutionality, was apparently predicated on the philosophy that what may be of questionable validity today, may tomorrow be difficult to overthrow.

<sup>122</sup> "Analysis of Fundamental Notions," *Modern French Legal Philosophy*, p. 452.

<sup>123</sup> "Even on technical questions concerning merely the internal structure of government, ill-considered advisory opinions before the event may become millstones around the necks of succeeding generations. Chaffee has kindly called attention to *In re The Constitutional Convention*, 14 R.I. 649 (1883), which has been an effective obstruction to the modernization of the Rhode Island Constitution of 1842. See Jameson, *Constitutional Conventions*, 4th ed., sec. 450 *et seq.*; *Opinion on the Calling of a Constitutional Convention in Rhode Island* (pamphlet by G. T. Brown *et al.*). In this opinion the Rhode Island Supreme Court advised the General Assembly that the Rhode Island Constitution of 1842 could not be organically revised by the people through a Constitutional Convention and that changes in the Constitution could only be secured by submission through the legislature of specific amendments, lack of which requires a three-fifths majority of the electors for its ratification." F. Frankfurter: *A Note on Advisory Opinions*, 37 Harv. L. Rev., 1008-1009 (1924).

closing the barn-door after the horse is stolen, in the other case there is the possibility of an opinion which has not been well considered.

If the judges lack competent legal assistance and have little time for mature deliberation, they cannot be held altogether responsible if ill-considered opinions result.<sup>124</sup> In some states the attorney general is supposed to render assistance to the judges upon request, but in practice very little assistance from counsel has been given.<sup>125</sup> This is an important fact, for our courts have always depended greatly on the researches of counsel in arriving at their own conclusions. The lawyer's rôle in adjusting law to changing needs has been no small one. "Webster," says Karl Llewellyn, "not Marshall, made the Dartmouth College case."<sup>126</sup>

With no argument of counsel, with no searching investigation of the principles involved, the judges can arrive at a conclusion only by consulting among themselves and comparing their several views on the matters.<sup>127</sup> This does not seem to be a

<sup>124</sup> "In the attitude of court and counsel, in the availability of facts which underlie litigation," says Felix Frankfurter, "there is a wide gulf between opinion in advance of legislative or executive action, and decisions in litigation after such proposals are embodied in law or carried into execution." *Social Science Encyclopedia*, p. 478.

<sup>125</sup> Karl Llewellyn has assembled an impressive list of highly important legal contrivances which have been created by the engineering skill of the lawyer. He shows the lawyers shaping the thousands of uses of the law of trusts; producing the bond that forms the basis of the investment market; maneuvering by way of trusts the first great consolidations; making party politics a possibility, and so on *ad infinitum*. *Bramblebush*, p. 152.

<sup>126</sup> "Growth in law, especially growth in case law, has been attributed too lightly in most legal writings to the courts. I would neither deny or belittle the part that courts play in that growth. But how many judges do you know, of whom it may be said as it once was of Holmes, 'the trouble with that fellow is that he is always deciding cases on points that were not raised in the briefs of either side'? How many judges do you know whose analysis of the case and of the situation is a major fresh creation, a 'Let there be light,' rather than the lesser type of building which consists in merely modifying the theory of one advocate or of the other? The job of choosing wisely between the inventions of counsel is a difficult one. The job of consistent wise choice is tremendous, yet it is not of itself the major work. That has been done, consistently, continuously by the bar." *Bramblebush*, p. 153.

<sup>127</sup> See *Reply of Judges of the Supreme Court to the General Assembly*, 33 Conn. 586.

very satisfactory arrangement. Then, too, when the advisory practice is made a part of a court's procedure, the burden of work imposed on the judges is bound to be increased.<sup>128</sup> The effect of this is obvious. With less time and attention to give, the quality of their work is bound to suffer.<sup>129</sup>

Perhaps some of the difficulties mentioned can be overemphasized. The political implications of the practice cannot be easily overlooked. Wherever and whenever the practice has been suggested or put into effect it has been opposed on the ground that it tended to involve the judges too intimately in matters of policy. The result of this involvement, it is claimed, weakened confidence in the disinterestedness of the judicial function, and also weakened the responsibility of the legislature and the people, who seem quite willing to pass the burden to the judiciary.

It is interesting to note that observers as widely removed as Sir Henry Maine and Alexis De Tocqueville have urged the importance of keeping the Supreme Court a strictly judicial body. Fearing the political effects of a different system, they would have the court exercise its power of measuring constitu-

<sup>128</sup> "In Nebraska the Attorney General and not the Supreme Court is the legal adviser of the Executive and Legislative departments. We are aware that this Court has, in some instances, assumed to answer questions submitted by other branches of the State Government, and then I, with much reluctance, assented. The Court is now burdened with business. The number of suits brought annually to this Court has so increased that the last legislature created a Supreme Court Commission to assist in the disposal of the numerous cases on the docket, and it seems to me, in justice to litigants, who have actions pending, it is time for the Court to call a halt, and entertain jurisdiction only in causes where the same is conferred by the Constitution." Remarks of Justice Norval in 37 Neb. 435.

<sup>129</sup> Professor Updegraff believes that objections to the advisory opinion practice cannot be sustained on the grounds that the court must act as both court and counsel, without the assistance of either brief or argument. He believes that steps could easily be taken to supply all the assistance necessary in this connection. Neither is he impressed with the argument that the practice would tend to overburden the court. Here again, he believes, steps could be taken to supply the courts with all the assistance necessary to adequately meet any additional burdens cast upon them. Paul C. Clovis and Clarence Updegraff, *Advisory Opinions*, 13 Iowa L. Rev. 188 (1928).

tionality, only in deciding a given case.<sup>130</sup> "The process is slower," says Sir Henry Maine, "but freer from suspicion of pressure and much less provocative of jealousy than the submission of broad and emergent political propositions to a judicial body."<sup>131</sup>

De Tocqueville strikes a similar note. "The American judge," he says, "is brought into the political arena independently of his own will; he only judges the law because he is obliged to judge a case. The political question which he is called upon to resolve is connected with the interest of the parties, and he cannot refuse to decide it without abdicating the duties of his post."<sup>132</sup> Under these circumstances, he thinks, constitutional pronouncements upon political questions are much less likely to arouse distrust and criticism than if the court decided such questions without parties in controversies.

While it is a difficult and unsatisfactory task to discuss such a broad concept as "popular responsibility" and the effect the advisory practice may have upon it; it is a subject, nevertheless, that deserves careful attention. James Bradley Thayer, a close student of the American constitutional system, and equally familiar with the Massachusetts practice, held the view that the American system would operate most effectively if judicial activity was strictly limited insofar as it related to a review of

<sup>130</sup> In the language of Mr. Justice Mathews, the Court "has no jurisdiction to pronounce any statute either of a state, or of the United States, void because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of this jurisdiction, it is bound by two rules to which it has rigidly adhered: one, never to anticipate a question of Constitutional law in advance of the necessity of deciding it (see *Hovatt v. Kansas*, 258 U.S. 181 (1922)); the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Steamship v. Commissioner*, 113 U.S. 33, 39 (1885).

<sup>131</sup> Sir Henry Maine, *Popular Government*, (1885), p. 223; see also Simeon Baldwin, *The American Judiciary*, (1905), pp. 32-33.

<sup>132</sup> De Tocqueville, *Democracy in America*, Vol. 1, p. 129.

legislation.<sup>133</sup> Like Holmes<sup>134</sup> and many others<sup>135</sup> he advocated a policy of judicial self-abnegation.<sup>136</sup> Opposing any tendency which encouraged the people to look to the judiciary for the protection of their constitutional guarantees,<sup>137</sup> he argued, that the people would have become more vigilant in their own behalf; if the habit of depending upon the judges, as the "guardians of their rights" was broken.

In this general view, "it is a gigantic illusion that the Supreme Court can defend the Constitution";<sup>138</sup> since constitutional guarantees of one kind or another derive their force and influence from the sanction and approval of the people. When that is withdrawn, they fail completely.<sup>139</sup> If the people through indifference, lack of understanding, or deliberate choice, permit their constitutional guarantees to be abrogated, "a few judges and an ancient document" will never save them. The courts,

<sup>133</sup> "If the decision in *Munn v. Illinois*, and in the *Granger* cases, twenty-five years ago, and in the *Legal Tender* cases, nearly thirty years ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which came to the country and its people from the rigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposing elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience which came out of it all—that all this far more than outweighed any evil which ever flowed from the refusal of the Court to interfere with the work of the legislature.

"The tendency of a common and easy resort to this great function now lamentably too uncommon, is to dwarf the political capacity of the people and to deaden its sense of moral responsibility. It is no light thing to do that." Thayer's *Marshall*, 103, 110, and *Legal Essays*, (Boston, 1908), 39-41.

<sup>134</sup> See Lief, *The Dissenting Opinions of Mr. Justice Holmes*, p. 285; see also Silas Bent, *Justice Oliver Wendell Holmes*, pp. 184, 224, 225-26, 342-343.

<sup>135</sup> Charles G. Haines, *The American Doctrine of Judicial Supremacy*, pp. 475-478.

<sup>136</sup> Maurice Finklestein, *Judicial Self Limitation*, 37 *Harv. L. Rev.* 338 (1924); Melville F. Weston, *Political Questions*, 37 *Harv. L. Rev.* 296 (1925).

<sup>137</sup> Thayer, *Legal Essays*, pp. 39-41 (1908).

<sup>138</sup> *Amer. Bar Ass'n. Jour.*, p. 607 (Oct., 1934).

<sup>139</sup> *Amer. Bar Ass'n. Jour.* pp. 498-540 (Sept., 1933).

says Alexis De Tocqueville, are "the all-powerful guardians of a people which respects law but they would be impotent against popular neglect or popular contempt."<sup>140</sup> If the views of Thayer and De Tocqueville have weight, popular responsibility is weakened, insofar as the advisory opinion practice tends to increase the dependency of the people upon their judges.

The Thayer suggestions merit careful attention. If followed, the courts of the country would resolutely adhere to first principles. "Let them consider," he says, "how narrow is the function which the Constitutions have conferred on them—the office merely of deciding litigated cases; how large, therefore, is the duty entrusted to others, and above all to the legislatures?"<sup>141</sup> It is the legislature, he asserts, "which is charged primarily with the duty of judging of the constitutionality of its work." Since the constitution generally gives them no authority to call upon a court for advice, and the courts may never be able to say a word, the legislatures, he believes, must decide for themselves.

In most European countries, the guardianship of the constitutions belongs to the legislatures, and "subject to a reversal by popular referendum or the election of a new assembly, the legislature determines the limits of its own authority and exercises control over the other departments of government."<sup>142</sup> While European experience may not assist us entirely, because

<sup>140</sup> "The peace, the prosperity, and the very existence of the Union were placed in the hands of these judges. Without their active cooperation the Constitution would be a dead letter. The Executive appeals to them for assistance against the encroachments on the legislative powers. The legislature demands their protection from the designs of the Executive. They defend the Union from the disobedience of States, the States from the exaggerated claims of the Union, the public interest against the interests of private citizens, and the conservative spirit of order against the fleeting innovations of democracy. Their power is enormous, but is clothed in the authority of public opinion. They are the all-powerful guardians of a people which respects law but they would be impotent against popular neglect or popular contempt." De Tocqueville, *Democracy in America*, Vol. 1, pp. 191-192.

<sup>141</sup> Thayer, *Legal Essays*, pp. 35-41.

<sup>142</sup> Charles G. Haines: "Some Phases of the Theory and Practices of Judicial Review of Legislation in Foreign Countries," *American Political Science Review*, Vol. XXIV, (Aug., 1930), pp. 591-592.

of basically different philosophies on the nature of the judicial process,<sup>143</sup> it can disprove the claim that a written constitution with limits on the power of government, becomes a mere "scrap of paper" if not guarded and protected by the judiciary.<sup>144</sup> For, as our foremost student of the subject points out, the experience in Belgium and Switzerland indicates "that legitimate private rights and privileges are likely to receive adequate protection without a judicial guardianship of the written Constitution."<sup>145</sup>

If the holders of legislative power are careless, or ineffective, the courts cannot improve the matter by attempting a function not their own. On the other hand, as Thayer suggested, if

<sup>143</sup> "Whereas the doctrine of judicial review of legislation is regarded in the United States as a necessary requirement in the application of the theory of the separation of powers, in Europe such a doctrine is generally thought to involve a confusion, and not a separation of powers. Building on the principle that there are only two great functions of government, namely, to make and to execute the laws, and that of necessity these functions must be carried out with the closest unity and cooperation possible, the judiciary is considered as a subordinate agency of these functions operating more directly under the control and direction of the executive department. To allow the Courts to check either or both of the primary functions of the state is thought to make the judges masters over all of government. Instead of establishing through judicial review, as Americans contend, a government of law and not of men, European jurists argue that it is precisely because the law is supreme that the legislature is placed above the other powers. Supremacy must reside in one department of government, and to European thinkers both reason and experience point to the legislature as the logical depository for supreme authority." *Ibid*, pp. 588-589.

<sup>144</sup> European jurists are inclined to believe that the review of legislation by the Courts places the judiciary in a position of supremacy. As they see it this raises the question as to whether jurists, or men engaged in political life, are better qualified to make such final decisions.

"The decisive questions are these: From what class should be selected the men who exercise a supreme control in a country? Ought they to be exclusively jurists, or men engaged in political life? For there is a marked difference between the two classes. The traditionalist spirit is much more accentuated with the former than with the latter. We observe, then, in last analysis, a conflict between two great tendencies, which are characteristic of human actions: on the one hand, a tendency which is conservative and traditionalist, and on the other hand, I would not call it a progressive tendency (for the question as to what is progress is not exactly determined), but a tendency to change, to seek the new. To the former class, it is observed, belong the judges, to the latter, legislators. Louis La Fur, 29 *Revue du Droit Public*, (1922), 313, 314." Quoted by Charles G. Haines, *ibid*, pp. 591-592.

<sup>145</sup> *Ibid*, pp. 592-593.



the courts adhere to the letter of their limited duty, it will help to fix the responsibility for legislative inadequacies with the legislature, where it belongs, and "bring down on that precise locality the thunderbolt of popular condemnation." The judiciary today, he asserts, "in dealing with the acts of coordinate legislatures, owes to the country no greater or clearer duty than that of keeping its hands off these acts whenever it is possible to do it. That will greatly help to bring the people and their representatives to a sense of their own responsibility."<sup>146</sup>

In conclusion, it may be repeated that the disadvantages of the advisory opinion are numerous. Popular responsibility is weakened; a proper legislative functioning is discouraged; and the judicial branch suffers as well. For the courts are not able to assume the additional burdens with grace. This type of responsibility, says Felix Frankfurter, should never be "shifted to the tribunal whose task is the most delicate in our whole system of government, involving as it does, the power to set limits to legislative and executive action within those vague bounds which are undefined and *a priori* undefinable."<sup>147</sup> With several hundred law suits involving recent congressional acts pending in the courts and the promise of many more,<sup>148</sup> it is too much to expect, however, that efforts will cease to be made to provide some device which will effect an early determination of constitutionality.

While some observers suggest the creation of a non-partisan commission of lawyers to advise Congress upon the constitutionality of proposed measures,<sup>149</sup> others believe the advisory opinion practice promises the best solution. In some instances, apparently, little consideration has been given to the practical effects of its use. To many, of course, it is a matter of small consequence whether the Supreme Court remains a purely

<sup>146</sup> Thayer, *Legal Essays*, pp. 35-41.

<sup>147</sup> *Social Science Encyclopedia*, Vol. I, p. 479.

<sup>148</sup> David Lawrence, "The New Deal Day by Day," *Columbus Sunday Dispatch*, Dec. 29, 1935.

<sup>149</sup> *Ibid.*

judicial body; is fabricated into some composite arrangement resembling the Court of Revision which existed in colonial days;<sup>150</sup> or is transformed into an economic council, somewhat after the fashion of the body proposed by Secretary of Agriculture Henry T. Wallace.<sup>151</sup> A lack of interest here does not seem the course of wisdom.

The problem requires more than a casual attention. One may accept the view of Justice Holmes that the United States will not come to an end if the Supreme Court loses its power to

<sup>150</sup> "New York originally not only gave her legislators a share in judicial power but her judges a share in that of legislation. Her Constitution of 1777 provided for a Council of Revision consisting of the Governor, the Chancellor, and the judges of the Supreme Court to whom all bills passed by the Senate and Assembly should be presented for consideration; and that if a majority of them should deem it improper that any such bill become a law, they should within ten days return it with their objections to the House in which it originated, which should enter the objections at large in their minutes, and proceed to reconsider the bill; and that it should not become a law unless re-passed by a vote of two-thirds of the members of each House. For forty years this remained a law, and the Council of Revision contained from time to time judges of great ability, Chancellor Kent being one. During this period, 6590 bills in all were passed. One hundred and twenty-eight of them were returned by the Council with their objections, and only seventeen of these received the two-thirds necessary to re-enact them." Baldwin, *The American Judiciary*, p. 30.

In Pennsylvania (Const. of 1776, sec. 47) and Vermont (Const. of 1777, sec. 44), a Council of Censors was provided for, to be chosen every seven years. It was to investigate the conduct of affairs and point out, among other things, all violations of the Constitution by the other departments. In Pennsylvania the arrangement lasted from 1776 to 1790; in Vermont, from 1777 to 1870.

<sup>151</sup> The Wallace Proposal involves setting up a staff of economic counselors, of perhaps four men, "as revered and trusted" as are those on the Supreme Court; appointed by the president for terms of nine, eleven, and fifteen years and given "the power to determine by direct referendum the key policies of the nation."

The plan would work something like this: The counsellors, whenever they would see a question of controversial policy that ought to be settled, instead of letting Congress pass legislation putting it into effect, and then waiting for the Supreme Court to rule on it, would allow the people to vote on it, and if two-thirds approve, then it would become a part of the law of the land which the Supreme Court could not alter.

Secretary Wallace asserts that at present about seven years ordinarily are required to amend the Constitution. He looks upon this as too long a time.

declare acts of Congress void<sup>152</sup> and still find little benefit in adding further complications to the delicate and difficult task now imposed upon the Supreme Court in dealing with questions of constitutionality. Although British constitutional development has demonstrated that many strange contrivances can be added, here, there, or the other place, in adapting political institutions to changing conditions, it would not seem that the introduction of the advisory opinion practice into our national system would serve a very useful purpose in solving any "present discontents" in the constitutional field.

<sup>152</sup> "I do not think the United States would come to an end if we (the Supreme Court) lost our power to declare an act of Congress void. I do think the Union would be imperiled if we would not make the declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action so taken embodies what the Commerce Clause was meant to end." "Speech before the Harvard Law School Association of New York," Feb. 15, 1913, *Collected Legal Papers*, pp. 295-296.